

PACIFIC GAS AND ELECTRIC COMPANY

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April 15, 1988

Ms. Diane M. Elder
Public Utilities Commission
State of California
505 Van Ness Avenue
San Francisco, CA 94102

Attention: Docket office

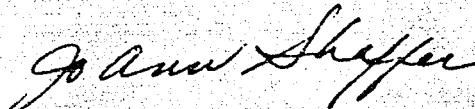
Reference: Application No. 87-10-018
(U-39E)

Dear Ms. Elder:

Enclosed for filing are an original and thirteen copies of the REPLY OF PACIFIC GAS AND ELECTRIC COMPANY TO RESPONSE OF DIVISION OF RATEPAYER ADVOCATES TO APPLICATION FOR REHEARING OF D.88-02-029.

Please file the originals and return an endorsed-stamped copy.

Very truly yours,



JO ANN SHAFFER

JAS:pr
Enclosure

cc: All Appearances of Record - COT Project
Administrative Law Judge Lynn Carew

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
PACIFIC GAS AND ELECTRIC COMPANY for a)
Certificate of Public Convenience and) Application 87-10-018
Necessity Authorizing Participation in) (Filed October 14, 1987)
the California-Oregon Transmission)
Project.)
(U39E))
_____)

REPLY OF PACIFIC GAS AND ELECTRIC COMPANY
TO RESPONSE OF DIVISION OF RATEPAYER ADVOCATES
TO APPLICATION FOR REHEARING OF D.88-02-029

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I

INTRODUCTION

On March 22, 1988, Pacific Gas and Electric Company (PG&E) filed an application (the Application) for rehearing of the Commission's Decision No. 88-02-029 (the Decision) which denied PG&E's appeal of the rejection of its application for a certificate of public convenience and necessity (CPCN) for participation in the California-Oregon Transmission Project (COT Project). The Application was filed pursuant to Rule 85 of the Commission's Rules of Practice and Procedure.

On April 6, 1988, the Division of Ratepayer Advocates of the Commission (DRA) filed a response (the Response) to the Application pursuant to Rule 86.2. In the Response, DRA requests the Commission to hold one or two days of hearings to make certain determinations regarding resolution of the so-called

1 south-of-Tesla issue, the issue which formed the basis for the
2 Commission's rejection of the COT Project application.

3 PG&E hereby files a reply to DRA's Response.

4 II

5 BACKGROUND

6 PG&E's Application contains a description of the background
7 of this case leading up to the Commission's Decision. After the
8 Commission issued the Decision rejecting PG&E's initial appeal of
9 the rejection of the COT Project application, PG&E filed an
10 application for rehearing in accordance with Rules 85 and 86.1 of
11 the Commission's Rules of Practice and Procedure specifically
12 alleging that the Commission's Decision violates the Permit
13 Streamlining Act (PSA) (Govt. Code 65920, et seq), and Public
14 Utilities Code Section 1708.

In response to the Application, DRA believes that:

16 PG&E's Application should be ^{he}granted to the
extent that the Commission hold one or ~~two~~
17 days of hearings to determine ~~whether~~:

- 18 (a) whether (sic) the "Transmission
19 Principles" identified in PG&E's [CPCN]
Application still represent even PG&E's
20 position on South-of-Tesla arrangements;
- 21 (b) whether (sic) any other mutually
the transmission arrangements
22 between PG&E and the other coparticipants
are likely to be reached in the near
23 future;
- 24 (c) whether (sic) intervening events since
November 13, 1987, have significantly
25 affected resolution of the south-of-Tesla
issue. (Emphasis in original. Response,
26 p.1)

III

DRA'S FILING IS NOT A "RESPONSE" AS CONTEMPLATED UNDER RULE 86.2
AND, THEREFORE, SHOULD BE DISREGARDED

Rule 86.1 requires an applicant to "set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous". PG&E's Application complies with Rule 86.1 by specifically setting forth the legal errors which it believes requires a reversal of the Decision, and presents legal arguments and analysis supported with citations. Rule 86.2 provides for a response to an application for rehearing. A reasonable interpretation of that rule is that such a filing will respond to the arguments raised in the application for rehearing. DRA's filing does not do so.

There is a paucity of legal arguments or analysis in DRA's filing in response to the legal errors specifically set forth in PG&E's Application. Instead, DRA's filing deals overwhelmingly, and almost exclusively, with factual information and questions regarding the so-called south-of-Tesla issue. If one eliminated the portions of DRA's filing not E's Application, one would be left with very little except a few conclusory, unsupported statements contending merely that the Commission has complied with the law.

DRA states that it believes that PG&E's Application should be "granted" to the extent that hearings should be held on the south-of-Tesla issue. The fallacy in this statement is that

1 PG&E's Application did not request a hearing on this issue! How
2 then can the Commission order hearings on that **issue** in the guise
3 of "granting" PG&E's Application? PG&E contends it cannot. The
4 only appropriate inquiry which can arise from PG&E's Application
5 must be within the context of the allegations of legal error as
6 contained therein. What then is the purpose of DRA's filing? It
7 is, again, an effort to misuse the CPCN Application's
8 completeness review as a **device** to address factual issues on the
9 merits. This is improper.

10 In the first round of appeal on the COT Project CPCN
11 application denial, the DRA failed to convince the Commission
12 that it should be able to continue discovery in the absence of an
13 accepted application. Now it would go even further by using
14 PG&E's Application as a vehicle not **only** to do discovery but to
15 **require** hearings on what it perceives to be a major issue in the
16 **case - all prior to acceptance of the CPCN application.** It is
17 difficult to imagine a more flagrant violation of the Permit
18 Streamlining Act and the Commission's procedures than to require
19 hearings, within the context of an application for rehearing, on
20 a factual issue as a prerequisite for acceptance of a CPCN
21 application. The issue for decision now is whether the
22 Commission committed legal error by redefining the project that
23 is the subject of PG&E's CPCN application. The Commission says
24 it did not; PG&E says it did. This is a legal question, the
25 resolution of which will not be aided by DRA's proposed hearings.

26 Assuming, arguendo, that an application for rehearing of

1 Decision 88-02-029 is an appropriate procedure to trigger
2 hearings and inquiry into a factual issue (a position with which
3 PG&E disagrees), DRA's request must, still be denied. DRA did not
4 file an application for rehearing but is simply responding to
5 PG&E's Application. That DRA did not **apply** for a rehearing of
6 Decision 88-02-029 is understandable. The Decision affirmed
7 rejection of PG&E's COT Project application -- the result sought
8 by DRA. DRA could hardly file an application for rehearing of a
9 Commission decision favorable to DRA, yet that is, in effect,
10 what DRA proposes here.

11 IV

12 DRA'S CONTENTION THAT THE COMMISSION'S STATEMENT THAT IT DID NOT
13 **VIOLATE** THE LAW IS EVIDENCE THAT IT HAS **COMPLIED** WITH THE LAW
14 **IGNORES THE ROLE OF JUDICIAL REVIEW**

15 In its Application, PG&E contends that the Commission's
16 manifest frustration with the time limit prescribed by the PSA
17 for review of a CPCN does not license it to circumvent that limit
18 by requiring information prior to acceptance which is properly
19 pursued during hearings, particularly where, as here, that
20 additional information was not required by the criteria list or
21 permitted by the PSA. DRA's response to this statement is
22 astonishing.

23 According to DRA, PG&E's contention cannot be true because,
24 in effect, the Commission says it isn't true. DRA says that in
25 the Decision "the Commission was careful in separating the
26 difficulties of expedited consideration of the large, complex
project from the legal basis of the rejection" (Response, p.11).

1 It then quotes from the Decision where the Commission states:

2 We do not believe, however, that we have
3 the authority under the statutes to delay
4 acceptance of an application in order to give
5 ourselves and our staff greater time to
6 consider the merits.
7 (Emphasis deleted. Response, p.11)

8 DRA apparently believes that because the Commission stated in
9 the Decision that it was without authority to delay acceptance of
10 the COT Project CPCN application in contravention of the
11 applicable statutes, its rejection of the application was per se
12 based on lawful grounds. If by the stroke of a pen the
13 Commission can make an absolute determination of the lawfulness
14 of its actions, Public Utilities Code Section 1756 (which grants
15 applicants the right to apply to the California Supreme Court for
16 a review for the purpose of having the lawfulness of an order or
17 decision determined) may as well be repealed. It is not the
18 province of the Commission to ultimately determine if its actions
19 comply with the law - it is the Court's. DRA apparently views
20 the statements and action of the Commission as sacrosanct. This
21 is simply not the case. Even the Commission must on occasion
22 face the harsh light of judicial scrutiny. We now ask the
23 Commission to rectify its legal error and eliminate the need for
24 judicial review.

25 V

26 CONCLUSION

DRA criticizes PG&E's Application for its focus on "the
narrowest of legal arguments and its complete disregard of the

1 facts" (Response, p.8). DRA's complaint ignores the fact that
2 legal error is a basis for an application for rehearing, is
3 evidence of its preoccupation with factual inquiry in this case
4 to the exclusion of proper procedures, and demonstrates the
5 weakness of its position on the legal **issues** raised by PG&E.

6 PG&E has appealed to the Commission for rehearing of its
7 Decision on the basis of a violation of the law. DRA, faced
8 without legal arguments supporting denial, uses its Response to
9 plead for inquiry into factual matters. The Commission should
10 disregard this request. PG&E has the right to have its
11 Application for Rehearing judged on the issues which it has
12 raised. DRA does not have the right to use PG&E's Application as
13 a vehicle to compel hearings on the merits of a factual issue as
14 a prerequisite for the Commission's decision on PG&E's
15 Application,

16 Respectfully submitted,

17 **HOWARD V. GOLUB**
18 **DOUGLAS A. OGLESBY**
19 **JO ANN SHAFFER**

20 BY 
21 **JO ANN SHAFFER**

22 **Attorney for Petitioner**
23 **PACIFIC GAS AND ELECTRIC COMPANY**

24 **April 15, 1988**
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PROOF OF SERVICE BY MAIL
(C.C.P. Secs. 1013a(1) and 2015.5)

I, the undersigned, state that I am a citizen of the United States and employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; that my Business address is 77 Beale Street, San Francisco, California 94106; and that on the date set out below I deposited a true copy of the attached

REPLY OF PACIFIC GAS AND ELECTRIC COMPANY TO RESPONSE
OF DIVISION OF RATEPAYER ADVOCATES TO PG&E's APPLICATION
FOR REHEARING OF D.88-02-029.

sealed in envelope(s) with postage thereon fully prepaid in a mailbox regularly maintained by the Government of the United States in the said City and County, addressed as follows:

(See attached Service List)

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct:

April 15, 1988
(Date)

Joyce C. Rauch
(Signature)